Supreme Court
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No. 97-410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLAY MONROE,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Railway Labor Act preempt a retaliatory discharge claim where the adjudication of the claim would require the court to interpret and apply the terms of the applicable collective bargaining agreement?

II. Does the Railway Labor Act preempt a retaliatory discharge claim where the adjudication of the claim would require the court to interpret and apply the terms of the applicable collective bargaining agreement and the plaintiff has not invoked an existing right independent of the collective bargaining agreement to the relief requested?

LIST OF PARTIES

Respondents agree with Petitioner Monroe's summary of the parties involved.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Missouri Pacific Railroad Company and Union Pacific Railroad Company respectfully request this Court to deny Petitioner Clay Monroe's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATUTES INVOLVED

45 U.S.C.§ 151a.

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 153(i) First

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such

disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C.§ 56

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

STATEMENT OF THE CASE

Monroe claims that he suffered physical injuries while working for Union Pacific[1] on July 20, 1992. Monroe remained off work after his alleged injury. In October 1992, while Monroe was still on a leave of absence from Union Pacific because of his

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[1] Missouri Pacific Railroad Company has merged into Union Pacific Railroad Company; Missouri Pacific is no longer a corporate entity. Thus, Union Pacific and Missouri Pacific assert identical interests, and this Brief will refer only to Union Pacific.

alleged injuries and physical incapacity, Union Pacific hired a private investigator to conduct surveillance on Monroe. The surveillance revealed that Monroe was working, actively installing satellite television systems, even though he was on medical leave from Union Pacific because of his alleged physical incapacity. The persons conducting surveillance videotaped Monroe engaging in the physical labor of installing a satellite system.

On December 8, 1992, Union Pacific held a formal disciplinary hearing and investigation pursuant to the provisions of the collective bargaining agreement ("CBA") which governed the conditions of Monroe's employment. At this hearing, the videotape was introduced into evidence, as was the testimony of a doctor who opined that Monroe was capable of performing the various tasks necessary for his brakeman's position. The doctor concluded that Monroe had misrepresented his physical condition to Union Pacific. By letter dated December 17, 1992, and as a result of the disciplinary hearing and investigation held on December 8, Union Pacific discharged Monroe from its employment for violating certain company rules by misrepresenting his physical condition and his inability to work.

On October 5, 1993, over nine months after his termination, Monroe filed a lawsuit in the Circuit Court of the City of St. Louis, Missouri, pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. In that suit (Monroe I), Monroe sought damages for personal injuries allegedly suffered on July 20, 1992. This was the first of four actions Monroe has prosecuted against his employer.

On October 12, 1994, Monroe filed a second suit in the Circuit Court of Madison County, Illinois (Monroe II), claiming that Union Pacific, the private investigation service which videotaped him, and several of its employees committed fraud, civil conspiracy and other similar state law torts which proximately caused his termination. The general basis of these claims is that

the defendants fraudulently represented that they were purchasing a television satellite antennae, when their real purpose was to conduct surveillance on Monroe, resulting in his termination. The compensatory and punitive damages Monroe seeks arise from his termination. This suit is currently pending in the Circuit Court for Jefferson County, Illinois

In addition to the civil suits described above, Monroe challenged his dismissal through a grievance and appeals filed pursuant to the procedures set forth in the CBA and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (Monroe III). In this proceeding, and as his Complaint in this action states, Public Law Board No. 5314, an arbitral entity existent pursuant to the RLA, issued an interim order directing that Monroe be reinstated to return to work. Petitioner's Appendix ("P.A."), at A-26, A-28, A-32. Public Law Board No. 5314 later awarded Monroe full backpay of $177,154.70 to compensate him for all wages lost from the date of his December 17, 1992 termination until his reinstatement to work. App., A-3 to A-6. The reinstatement was "with seniority and benefits unimpaired." P.A., A-32. Monroe's attorney in this action, Mr. Jerome Schlichter, prosecuted the grievance on Monroe's behalf. App., A-8. Mr. Schlichter appeared for oral argument before the Public Law Board on January 18, 1996, and filed a brief in support of Monroe's grievance which argued that the Public Law Board must determine Monroe's claim for retaliatory discharge. App., A-8.

Monroe filed the present action (Monroe IV), his fourth legal proceeding against Union Pacific, on March 19, 1996 in the Circuit Court of Marion County, Illinois. Count I of the Complaint at issue attempts to state a claim pursuant to 45 U.S.C. § 55, a provision of the FELA; Count II attempts to state an Illinois common law claim of retaliatory discharge in violation

of the public policy of the State of Illinois.[2] Monroe characterizes Count III as a request for punitive damages relief.

Union Pacific properly removed the action to federal court,[3] and shortly thereafter, filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion submitted that the district court lacked subject matter jurisdiction because the RLA preempted the claims as alleged. The motion also argued that Monroe failed to state an actionable claim for relief, in that Illinois law does not recognize a cause of action based upon the facts pleaded and § 5 of the FELA, 45 U.S.C. § 55, does not afford a private right of action for damages. The motion further established that even if § 55 afforded such a retaliatory discharge claim, the applicable three year statute of limitations barred the claim. The motion also asserted that Monroe should be judicially estopped from pursuing his retaliatory discharge claims due to his representation to the Public Law Board that the RLA grievance machinery provided his only avenue for relief. The district court found that the RLA pre-

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[2] As discussed throughout this brief, pursuant to Illinois law, "wrongful discharge" and "retaliatory discharge" are different theories of relief, but some opinions use the terms loosely. Briefly stated, a wrongful discharge claim is based on some type of contractual right to continued employment. *See Duldulao v. St. Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987). The theory of retaliatory discharge claim is based upon the defendant's termination of the plaintiff for a reason defined by state law as unlawful or protected. Monroe often refers to the Count II claim as one for wrongful discharge in violation of public policy; Union Pacific construes this claim as a claim for retaliatory discharge. If Monroe bases his claim on any contractual right, such a claim is unquestionably preempted by the RLA. *Andrews v. Louisville Nashville R.R. Co.*, 406 U.S. 320 (1972).

[3] Union Pacific removed this case on the basis of diversity and federal question jurisdiction. Monroe did not file a motion to remand or otherwise challenge federal subject matter jurisdiction. Thus, the point of Section I of the Honorable Judge Fairchild's dissenting opinion is not clear. P.A., A-12 to A-13.

empted Monroe's claims, granted the motion to dismiss for lack of subject matter jurisdiction, and did not address the Rule 12(b)(6) portion of the motion. Monroe appealed.

By opinion dated June 10, 1997, the Seventh Circuit affirmed the dismissal of Monroe's Complaint due to RLA preemption, and did not decide the Rule 12(b)(6) arguments. The Seventh Circuit discussed at length this Court's decisions in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). Indeed, the great majority of the Seventh Circuit's opinion summarized and analyzed this Court's holdings, and reconciled its finding of RLA preemption with the decisions of this Court. The Seventh Circuit concluded that Monroe could not "artfully plead" around RLA preemption because the "factual particularities of [his] complaint" required RLA preemption. P.A., A-11. Judge Fairchild dissented from the majority's finding of RLA preemption on the ground that Monroe's claim did not assert a breach of the CBA.

REASONS FOR DENYING THE WRIT

As the Seventh Circuit opinion in this case makes clear, the Seventh Circuit fully considered and correctly decided the issues presented. The Seventh Circuit and the district court carefully analyzed the RLA preemption standard and found RLA preemption based upon the specific facts pleaded in Monroe's Complaint. Both the Seventh Circuit and the district court elaborated upon this Court's decisions in *Hawaiian Airlines* and *Lingle*, and determined that preemption of Monroe's claims was consistent with those decisions. The Seventh Circuit also analyzed decisions of other circuit courts of appeals, and its opinion is in accord with those from other circuits. Finally, the Seventh Circuit examined its prior decisions on RLA preemption, and distinguished the facts of this case from a case where it concluded the RLA did not preempt. It is Monroe who misconstrues the applicable RLA preemption standard, and urges this Court to adopt a standard which would permit any plaintiff to avoid federal preemption by merely stating that his claim implicates some right outside of the CBA. Thus, a writ of certiorari is clearly unwarranted because the Seventh Circuit correctly decided this case, in harmony with the decisions of this Court and the other circuits.

Monroe's petition for certiorari should also be denied for several other reasons. The Seventh Circuit's decision stands on its facts, just like every other circuit court of appeals opinion which is not reviewed by this Court. Monroe's argument that this decision will cause the "sky to fall" by requiring federal preemption of every wrongful discharge case asserted by a person subject to a CBA is baseless. In addition, review of the RLA preemption issues in this particular case would be futile because Monroe has not even stated an actionable claim for relief. No court has ever recognized the type of claims Monroe asserts. Not only would review prove futile, but this case does

not present important issues of law. Moreover, this case, Monroe's third legal proceeding to challenge his discharge, is of little or no importance to the parties, because Monroe has been reinstated to his job with full backpay and restoration of all other rights.

I. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT BASED UPON THE FACTS ALLEGED IN MONROE'S COMPLAINT, THE RAILWAY LABOR ACT PREEMPTED HIS CLAIMS, IN THAT THE ADJUDICATION OF HIS CLAIMS WOULD REQUIRE INTERPRETATION AND APPLICATION OF THE COLLECTIVE BARGAINING AGREEMENT AND BECAUSE HIS ARTFULLY PLEADED CLAIMS WERE NOT TRULY INDEPENDENT OF THE COLLECTIVE BARGAINING AGREEMENT

A. The Railway Labor Act Preemption Standard

In *Hawaiian Airlines*, this Court adopted the standard of preemption which governs the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, as articulated in *Lingle*, to govern claims of RLA preemption. 512 U.S. at 260-63. Two general principles arising out of *Hawaiian Airlines* govern RLA (and LMRA) preemption. First, the RLA preempts where the resolution of the claim depends upon the interpretation and application of a CBA. *See* 45 U.S.C. § 151(a); *Hawaiian Airlines*, 512 U.S. at 253. Second, the RLA does not preempt a cause of action which involves rights and obligations truly independent of the CBA. The RLA preempts all "minor disputes," and limits courts' subject matter jurisdiction to hear minor disputes to judicial review after the claimant has exhausted the appeal and arbitration procedures mandated by the RLA. 45 U.S.C. § 153(p) First; *Andrews*, 406 U.S. 320.

Thus, the first aspect of the preemption standard examines whether interpretation or application of the CBA is required. "[A] CBA is more than the sum of its parts. It comprises express provisions, industry standards, and 'norms that the parties have created but have omitted from the collective bargaining agreement's explicit language.'" *Fry v. Airline Pilots' Ass'n*, 88 F.3d 831, 836 (10th Cir. 1996), *quoting Hawaiian Airlines*, 114 S.Ct. at 2250; *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 215 (1985)("The assumption that the labor contract creates no implied rights is not one that state law may make."); *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 308 (1989)(CBA's "often incorporate express or implied terms that are designed to give management, or the union, a degree of freedom of action within a specified area of activity.") Therefore, the RLA preempts if resolution of the claim "depend[s] not only on a right found in the CBA's, but also if [it] implicate[s] practices, procedures, implied authority or codes of conduct that are part of the working relationship." *Fry*, 88 F.3d at 836.

To avoid RLA preemption, the plaintiff must also possess a specific right to the relief requested independent of the CBA. This Court has long recognized that a plaintiff cannot avoid preemption by merely labeling his claim as arising under state or federal law. *See Lueck*, 471 U.S. at 220 (Preemption "cannot vary with the name appended to a particular cause of action"). Thus, the fact that a claim is couched in terms of some right independent of the CBA is not dispositive. Not only must the theory of relief be truly independent of the CBA, but the facts that the plaintiff actually alleges and must ultimately prove to recover under this theory must also be independent of the CBA. *See id.; Fry*, 88 F.3d at 836-88 (Court rejected the plaintiffs' arguments that motive was the sole issue, and held that the state law conspiracy claims could be resolved only through interpretation and application of the CBA's which gave rise to the plaintiffs' claims); *Kollar v. United Transportation Union*, 83 F.2d 124, 126 (5th Cir. 1996).

B. The Seventh Circuit Correctly Applied The RLA Preemption Standard

The Seventh Circuit's opinion explained the preemption standard in great detail. P.A., A-4 to A-6. The court looked to the statutory language that minor disputes grow "out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," (*quoting* 45 U.S.C. § 151a), and noted this Court's directive that minor disputes "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." P.A., A-4, A-5, *quoting Hawaiian Airlines*, 512 U.S. at 252-53 (additional citations omitted). The court then discussed the facts and holdings of *Hawaiian Airlines* and *Lingle*.

The Seventh Circuit next evaluated its own prior RLA preemption decisions in light of *Hawaiian Airlines* and *Lingle*. In *Bielicke v. Terminal R.R. Ass'n*, 30 F.3d 877 (7th Cir. 1994), the Seventh Circuit agreed with the district court that the RLA preempted a claim for injunctive relief pursuant to the FELA seeking to halt CBA disciplinary proceedings, where the plaintiffs contended that the defendant abused its CBA investigatory powers to discourage railroad employees from filing FELA injury suits. A few months later, in *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316 (7th Cir. 1994), the Seventh Circuit held that the RLA did not preempt a plaintiff's claim pursuant to the Illinois workers' compensation statute alleging that he was retaliated against for filing a workers' compensation claim.

After reviewing the applicable precedent, the Seventh Circuit stated that "[l]ike the district court, we agree that an uncritical glance at Monroe's claims seems to compel a finding of no preemption in light of the Supreme Court's *Hawaiian Airlines* and our *Sky Chefs* decisions." P.A., A-8. However, the Seventh Circuit correctly looked beyond the label attached to the claim and analyzed the language of the Complaint. Based on the

specific allegations in the Complaint, the Seventh Circuit concluded that adjudication of Monroe's wrongful discharge claims would require CBA interpretation to determine the validity of his claims. *Id.*

The Seventh Circuit identified five specific factors which compelled RLA preemption of Monroe's claims.[4] First, Monroe's Complaint specifically averred that Union Pacific did not avail itself of its CBA right to compel a physical evaluation to determine his physical condition. *Id.* Second, due to the particularities of the Complaint, a court would be required to apply and interpret various standards regarding employee fitness and job duties, which are implied CBA terms, to adjudicate his claims of pretext. *Id.* Third, Monroe challenged the propriety of the CBA disciplinary hearing and the sufficiency of evidence at that CBA hearing. *Id.* at A-9. Fourth, Monroe specifically alleged loss of promotions, seniority, benefits, and wages, which would require CBA interpretation.[5] Fifth, the court noted that Monroe argued to the Public Law Board in his grievance that his claim to challenge his dismissal was a minor dispute which must be decided through the grievance machinery and cannot be decided through a lawsuit.[6] *Id.* at A-9; App., A-10. Accord-

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[4] This stands in contrast to *Hawaiian Airlines*, where the employer's argument that the claim required CBA interpretation identified only the need to determine whether the employee was actually terminated as involving interpretation of the CBA. 512 U.S. at 266.

[5] The Seventh Circuit recognized the holding in *Livadas v. Bradshaw*, 512 U.S. 107, 124-26 (1994), that this reason alone does not support RLA preemption; however, courts may consider this factor. P.A., A-9 n.4.

[6] The court acknowledged that the existence of a grievance remedy does not require RLA preemption of a suit based on the same facts. P.A., A-9, n.5, *citing Hawaiian Airlines*, 512 U.S. at 258-64. However, the court was justified in relying on this as a factor supporting RLA preemption when Monroe himself represented to another tribunal that his discharge claim (pursuant to 45 U.S.C. § 55) was a minor dispute that must be remedied through the CBA and RLA grievance procedures. App., A-10.

ingly, the Seventh Circuit concluded that the "adjudication" of Monroe's discharge claims would require interpretation of the CBA, and the RLA therefore preempts those claims. P.A., A-10.

Contrary to Monroe's contentions, the Seventh Circuit did not hold in the present case that the RLA preempts all retaliatory discharge claims. Rather, the court examined the complaint presented, and correctly found that "[t]he factual particularities of Monroe's complaint, however, require an interpretation of the CBA and thus mandate our finding of preemption." *Id.* at A-11; *see Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992)("Plaintiffs can plead themselves out of court.")

The Seventh Circuit correctly recognized that Monroe could not "artfully plead" around RLA preemption. P.A., A-11. The court relied upon holdings from two other circuits in analyzing Monroe's attempt to recast preempted claims as not involving the CBA. In *Kollar*, 88 F.3d 124, the plaintiffs alleged that the defendant committed fraud by misrepresenting the seniority provisions of a CBA. The Fifth Circuit held that even though the plaintiffs couched their claim in terms of fraud, a state law claim independent of the CBA, adjudication of the fraud claim would require interpretation of the seniority provisions of the CBA. *Id.* at 126, *cited at* P.A., A-10. The Seventh Circuit also considered the Tenth Circuit's decision in *Fry*, where the plaintiffs alleged claims pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and various state law tort claims. P.A., A-11. 88 F.3d at 834. The gravamen of these claims was that the plaintiffs and their families were subject to harassment; a CBA provision prohibited such harassment. *Id.* The Tenth Circuit held that the RLA preempted because the plaintiffs' claims could not be understood without reference to the CBA, and that the claims could be resolved only through interpretation and application of the CBA. *Id.* at 836-37. Thus, the Seventh Circuit reconciled its decision with precedent from other circuits.

The RLA also preempts Monroe's claims because he lacks a specific right independent of the CBA to the relief requested. While the Seventh Circuit said that the "source" of his claims is independent of the CBA, P.A., A-8, the remainder of the opinion recognized that a plaintiff cannot avoid RLA preemption by merely invoking state law. This Court has consistently rejected such attempts to avoid preemption. *E.g., Lueck*, 471 U.S. at 220. Moreover, Monroe cannot avoid RLA preemption because the theories of relief he invoked do not afford him a legal right to the relief requested as a matter of law. *See* Sections I.C.2. and II.C., *infra*. The Seventh Circuit found RLA preemption due to the need to interpret the CBA, so it did not fully address the "independent right" issue. However, the court did state that it was "highly skeptical" that Monroe had even invoked a cognizable right. P.A., A-8. This skepticism was well-founded, as neither Illinois state law nor 45 U.S.C. § 55 confer a right of action upon Monroe. Monroe cannot avoid RLA preemption by asserting a non-existent claim or right as one which is "independent" of the CBA.

C. Monroe's Contentions Are Simply Incorrect, And Further Review Is Not Warranted

Monroe's arguments in support of certiorari rely upon misinterpretation of the RLA preemption standard, and misstatement and exaggeration of the scope and effect of the Seventh Circuit's holding. Contrary to Monroe's arguments, the decision below follows *Hawaiian Airlines* and *Lingle*, and does not state that the RLA preempts all claims of retaliatory or wrongful discharge.

1. Monroe Overlooks The Applicable Standard

Monroe essentially argues that *Hawaiian Airlines* stands for the proposition that as long as the CBA is not the only source of the right asserted by the plaintiff, the RLA does not preempt. *See* Brief, at 8, 10-13. Monroe attempts to demonstrate inconsis-

tency within the Seventh Circuit's opinion by relying upon the statement that the "source of [Monroe's] claims is independent of the CBA because they are found in the FELA and Illinois public policy." P.A., A-8. Monroe thus concludes that since he labeled his claims as state law retaliatory discharge and § 55 claims, the RLA cannot preempt. This argument is contrary to well-established principles of preemption. As discussed *supra*, the label a plaintiff attaches to his claims does not end the preemption inquiry. The Seventh Circuit correctly found that the RLA preempts Monroe's claims because they require interpretation of the CBA; this mandates preemption. If Monroe's logic is accepted, federal law could not preempt any claim as long as the plaintiff labeled his claim as grounded in some source other than the preemptive law at issue. Accordingly, Monroe's argument severely misconstrues this Court's teachings.

2. Monroe Cannot Escape Preemption Because He Holds No "Independent Right"

Another fundamental flaw in Monroe's argument against RLA preemption is that neither Illinois state law nor 45 U.S.C. § 55 confers upon him a claim for damages. Count I of Monroe's Complaint invokes § 55. Section 55 generally prohibits "devices" intended to exempt a railroad from FELA liability. No court has ever recognized the validity of a private cause of action based on § 55. No reported opinion has ever held that a plaintiff can collect damages for improper discipline or discharge through a private cause of action afforded under § 55. Several circuit courts of appeals have specifically rejected the contention that § 55 affords a claim for damages relief. *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1252 (5th Cir. 1986); *Landfried v. Terminal R.R. Ass'n of St. Louis*, 721 F.2d 254, 256 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1050-51 (7th Cir. 1983), *cert.*

denied, 465 U.S. 1007 (1984); *Bay v. Western Pacific R.R. Co.*, 595 F.2d 514, 516 (9th Cir. 1979).[7]

Thus, Monroe's contention in Section II of his Brief that the Seventh Circuit's holding is contrary to this Court's decision in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), is based upon an entirely false premise — that he can state a wrongful discharge claim under § 55. Monroe's arguments regarding *Buell* are also irrelevant because the claim in *Buell* was very different than the case at hand. The *Buell* Court determined that the RLA did not preempt an FELA negligence claim seeking recovery for personal injury pursuant to 45 U.S.C. § 51. The Seventh Circuit's decision does not create a "clear and irreconcilable" conflict with *Buell*, as Monroe contends, Brief, at 21, because Monroe does not allege a personal injury in the present litigation and § 55 does not create a claim for relief, and in any event, the opinion below does not state that it preempts all claims based on § 55.

Monroe also fails to invoke a cognizable "independent right" under state law. One of the subtitles of Monroe's Brief states that "[t]he Seventh Circuit's decision abrogated a valid claim by Monroe which the State of Illinois has long recognized." Brief, at 14. This plainly misrepresents Illinois law. As a matter of fact,

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[7] Courts have uniformly construed the Congressional intent underlying § 55 not to create a private cause of action. *See Jackson*, 717 F.2d at 1050-51 ("There is admittedly a superficial appeal to reasoning that the FELA . . . prohibits an employer from discharging an employee in retaliation for filing an FELA action. Such a statute has not, however, been enacted by Congress.") The most extensive discussion of § 55's legislative history is articulated in *Bay*, 595 F.2d at 516, where the court concluded that Congress' purpose "was to create a 'shield' against a railroad's defense that an employee had contracted away his right to sue the railroad for personal injuries and not to provide a 'sword' for a separate suit against the railroad."

no published Illinois decision recognizes a claim for discharge in retaliation for filing an FELA suit, as Monroe alleges. Illinois courts have rejected extremely similar attempts to expand the scope of the tort of retaliatory discharge. See discussion, at Section II.C.2.

In short, no court has ever permitted any plaintiff to assert a claim under either theory Monroe invokes, and the Seventh Circuit stated that it was "highly skeptical" that Monroe's claims could survive a Rule 12(b)(6) motion to dismiss. P.A., A-8. Thus, Monroe cannot avoid RLA preemption by relying on "independent rights" which do not exist.

3. Monroe's Reasoning Is Otherwise Deficient

Monroe's preemption analysis is deficient in several other respects. After correctly pointing out that mere reference to a CBA does not warrant preemption, Monroe argues, without citation (and understandably so) that "[t]o be preempted, the claim must be the product of a breach of a collective bargaining agreement. As long as the cause of action is not founded upon a breach of the collective bargaining agreement, reference to the collective bargaining agreement in resolving the claim does not preempt the claim." Brief, at 12. This is simply not the law.

Monroe also argues that the Seventh Circuit incorrectly found preemption where the reference to the CBA was incidental, in derogation of this Court's holdings. Brief, at 9. The Seventh Circuit analyzed this issue, and expressly rejected this argument. P.A., A-9 to A-11. The court found that the adjudication of Monroe's complaint would require more than mere consultation of the CBA; it would require interpretation of several different elements of the CBA. Accordingly, this Court should ignore Monroe's unfounded pleas that other courts will apply this decision to find that the RLA preempts any claim that involves incidental references to a CBA.

II. NOTWITHSTANDING THE SEVENTH CIRCUIT'S CORRECT DISPOSITION OF THE ISSUES PRESENTED, THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI FOR SEVERAL REASONS

A. The Decision Below Does Not Conflict With The Decisions Of This Court Or Other Circuit Courts of Appeals

The primary focus of Monroe's Brief is that the decision below conflicts with *Hawaiian Airlines* and *Lingle*. The court engaged in a lengthy analysis of both decisions, and then its own decision in *Sky Chefs*, which applied *Lingle* and *Hawaiian Airlines* to find that the RLA did not preempt a retaliatory discharge claim. Based on this analysis, the court specifically found that "[u]nlike the claims in *Hawaiian Airlines* and *Lingle*, Monroe's claims do not involve purely factual questions, and they do require interpretation of the CBA." P.A., A-8. Indeed, the Seventh Circuit dedicated most of the opinion to analyzing this Court's decisions and reconciling its finding of RLA preemption with those decisions. Monroe now seeks to create a conflict where none exists.

Likewise, the decision below does not conflict with *Buell*, as Monroe asserts. The *Buell* Court determined that the RLA did not preempt an FELA negligence claim seeking recovery for personal injury pursuant to 45 U.S.C. § 51. 480 U.S. 557. The Seventh Circuit's decision does not create a "clear and irreconcilable" conflict with *Buell*, as Monroe contends, Brief, at 21, because (1) Monroe does not allege a personal injury pursuant to § 51, as in *Buell*; (2) the opinion below does not state that it preempts any and all claims based on § 55; (3) and § 55 does not create a claim for damages in any event.

The Seventh Circuit's decision also does not conflict with those of other circuits. The Seventh Circuit correctly concluded that its "finding of preemption here complies with the recent

application of *Hawaiian Airlines* by two other circuits." P.A., A-8 to A-9, citing *Fry*, 88 F.3d 831 (10th Cir. 1996), and *Kollar*, 83 F.3d 124 (5th Cir. 1996). The opinion below noted that both *Fry* and *Kollar* found that the RLA preempted claims purportedly based on federal law and state tort law because the adjudication of those claims would require interpretation of the applicable CBA's. Each of these three decisions correctly applied *Hawaiian Airlines*.

Contrary to Monroe's allegation of a "conflict," the cases cited by Monroe simply found that the plaintiff's claims did not require any interpretation of the CBA and that the plaintiff possessed a right to the relief requested independent of the CBA, thereby rendering preemption inapplicable. *See Shafii v. British Airways, PLC*, 83 F.3d 566 (2d Cir. 1996)(Court found that the plaintiff asserted a right independent of the CBA, and that his claim could be decided "without looking into the CBA."); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995)(Court's lengthy analysis concluded that CBA interpretation was not required and disability discrimination statute was independent of CBA); *Taggart v. TransWorld Airlines, Inc.*, 40 F.3d 269 (8th Cir. 1994)(same); *Martin Marietta Corp. v. Maryland Comm. On Human Relations*, 38 F.3d 1392 (4th Cir. 1994)(same); *Gay v. Carlson*, 60 F.3d 83, 88 (2d Cir. 1995)(Court concluded "[n]o interpretation of the [CBA] is required to resolve these claims" arising under clearly actionable state tort law theories); *Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995)(same).

Like the Seventh Circuit in the present case, many circuit court of appeals decisions issued after *Hawaiian Airlines* have found RLA or LMRA preemption of claims pleaded under various federal and state law tort theories where the adjudication of those claims would require interpretation of the CBA or if the rights asserted were not truly independent of the CBA. *See Pilkington v. United Airlines, Inc.*, 112 F.3d 1532 (11th Cir. 1997)(RLA

preempted RICO and various state law tort and contract claims because adjudication of the claims would be intertwined with analysis of the CBA); *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245 (4th Cir. 1997)(LMRA preempted claim labeled as a wrongful discharge tort claim because it depended upon the CBA); *Stone v. Writer's Guild of America West, Inc.*, 101 F.3d 1312 (9th Cir. 1996)(LMRA preempted claims for fraud and intentional infliction of emotional distress because the adjudication of these claims was dependent on analysis of CBA); *Smith v. Houston Oilers, Inc.*, 87 F.3d 717, 721 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 510 (1996)(LMRA preempted claim of intentional infliction of emotional distress because adjudication of claim was "too dependent on an analysis of the CBA.")[8]

Hawaiian Airlines did not create a bright-line rule. Courts must still determine LMRA and RLA preemption on a case-by-case basis; the differences in the facts and rights asserted and theories of relief alleged will necessarily result in some decisions correctly finding preemption while others correctly deny it.

The Seventh Circuit has applied *Hawaiian Airlines* and *Lingle* to conclude that the LMRA or the RLA do not preempt state law claims. Indeed, just four days before the challenged decision was rendered, the Seventh Circuit issued its decision in *Schmidt v. Ameritech Corp.*, 115 F.3d 501 (7th Cir. 1997), reversing the district court's decision, and finding that the LMRA did not preempt an employee's state law tort claims. *See also Sky Chefs,*

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[8] The decisions in *Davis, Stone, Smith* (and *Kollar*), from the Fourth, Fifth, and Ninth Circuits, respectively, undercut Monroe's argument that the decision at issue " flatly conflicts with decisions from the Second, Fourth, Fifth, Eighth, and Ninth Circuits." Brief, at 10. Moreover, the Fifth Circuit's decisions in *Smith, Kollar* and *Hirras* further demonstrate that preemption depends upon the particular facts, and must be determined on an individualized basis.

35 F.3d 316. The Seventh Circuit's decisions properly and consistently apply the standards set forth by this Court; Monroe simply disagrees with the Seventh Circuit's conclusions.

B. The Seventh Circuit's Decision Stands On Its Facts

Monroe argues that "[e]ven where state and federal law claims invoke substantive rights independent of the CBA [and Monroe's claims do not], the Seventh Circuit's holding necessarily eliminates all state wrongful discharge claims for union employees in the railroad industry because one must refer to the CBA incidentally in each case." Brief, at 6. The decision below does not necessarily compel RLA preemption of all wrongful or retaliatory discharge claims. The court carefully stated that "[t]he factual particularities of Monroe's complaint, however, require an interpretation of the CBA and thus mandate our finding of preemption." P.A., A-11. The district court and the Seventh Circuit properly relied upon the specific allegations of Monroe's Complaint.

The decision below, like every other circuit court of appeals decision, stands on its facts. This Court does not sit to issue opinions which simply clarify or declare how a lower court's opinion should be applied in the future, or how one particular factual situation should be addressed. District and circuit courts will undoubtedly be required to apply the Seventh Circuit's opinion, as well as other decisions finding that the RLA does and does not preempt various types of claims on a case-by-case basis. This Court has previously instructed that courts must follow such an approach, stating that "[t]he full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." *Lueck*, 471 U.S. at 220. That is precisely what the lower courts have done in this case.

Indeed, throughout his Petition, Monroe overstates the effect of the Seventh Circuit's decision, ignoring the language of the

opinion in an attempt to attract this Court's attention. Monroe also argues that certiorari is warranted because every wrongful discharge claim within the Seventh Circuit will "encounter the argument that it is preempted because necessarily requires interpretation of the CBA." Brief, at 9. The Seventh Circuit and the district courts are fully capable of deciding the cases before them. Actually, in the challenged opinion, the Seventh Circuit discussed and reaffirmed the validity of its holding in *Sky Chefs*, 35 F.3d 316, which found that the RLA did not preempt a state law claim; the reaffirmation of *Westbrook* should assuage any fears that the Seventh Circuit applies preemption too expansively.

C. Further Review Would Be Futile Because Monroe Cannot State An Actionable Claim For Relief

Monroe fails to state an actionable claim for relief against Union Pacific for several reasons. Because the district court and the Seventh Circuit found RLA preemption, neither court addressed the Rule 12(b)(6) arguments, although the Seventh Circuit noted that it was "highly skeptical" that Monroe could state an actionable claim. P.A., A-8 n.3. This Court has stated that a writ of certiorari should not issue where the questions presented are merely "academic or episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Because Monroe cannot state a claim in any event, this Court should deny his petition for certiorari.

1. 45 U.S.C. § 55

No court has ever held that 45 U.S.C. § 55 creates a right of action to recover damages, for retaliatory discharge or any other wrong. *See* discussion, *supra*, at Section I.C.2. The primary remedial provision of the FELA, 45 U.S.C. § 51, permits the recovery of damages for personal injuries caused by the employing railroad's negligence, but does not permit a claim for retaliatory discharge. *Jackson*, 717 F.2d at 1050-51. No provi-

sion of the FELA forbids retaliatory discharge or provides a private cause of action for retaliatory discharge. *Id.* Under the ancient maxim of statutory construction, *expressio unius est exclusio alterius*, "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693 (1974). The specific inclusion of remedial provisions in §§ 51 and 59 and the omission of language in § 55 which forbids retaliatory or wrongful discharge or confers a right of action compels the conclusion that no such prohibition or right of action for damages exists. Monroe has not demonstrated that Congress intended to prohibit wrongful discharge or provide a remedy for it by enacting § 55. Moreover, even if § 55 permitted such a claim for retaliatory discharge, such a claim in this case is clearly barred by the three year statute of limitations applicable to FELA claims.[9] 45 U.S.C. § 56. As a result, Monroe cannot state a claim pursuant to § 55, and therefore this section does not confer an independent right which could potentially avoid RLA preemption.

2. Retaliatory Discharge

Illinois courts first recognized a claim for retaliatory discharge in *Kelsay v. Motorola*, 384 N.E.2d 353 (Ill. 1978), which created a limited exception to the employment at-will rule for persons terminated in retaliation for filing a workers' compensation claim. Illinois courts later extended the retaliatory discharge cause of action in favor of "whistleblowers." *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981). However, Illinois courts have steadfastly refused to expand the retaliatory discharge cause of action beyond the two narrow circumstances of retaliation for filing a workers' compensation

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[9] Monroe was terminated on December 17, 1992, and filed this suit on March 19, 1996.

claim and for certain types of "whistleblowing." *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 381 (7th Cir. 1992); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 925 (7th Cir. 1990); *Price v. Carmack Datsun, Inc.*, 485 N.E.2d 359 (Ill. 1985); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354 (Ill. 1985).

No reported Illinois decision has ever permitted a retaliatory discharge claim where a railroad terminated an employee to limit his FELA claim or in retaliation for filing an FELA claim. Monroe cites no such case.

Monroe assumes that he can state an actionable claim because Illinois affords a retaliatory discharge claim to persons who are retaliated against for filing a worker's compensation claim. However, outside of the worker's compensation laws, Illinois law does not afford a claim to persons who are retaliated against for seeking compensation for on-duty injuries. In fact, an Illinois court has rejected this precise argument. *Mitchell v. Deal*, 609 N.E.2d 378 (Ill. App. 1993). In *Mitchell*, the plaintiff farm laborer suffered severe on-duty injuries, and his employer was not subject to the Illinois workers' compensation law. *Id.* at 378-80. Shortly after the worker hired an attorney to pursue the injury claim, the defendants terminated his employment and evicted him from his home in retaliation for pursuing compensation. *Id.* at 379. The court held he could not state an actionable retaliatory discharge claim, even noting that "with the exception of Workers' Compensation coverage this case is indistinguishable from *Kelsay*." *Id.* at 380. Thus, an employee retaliated against for seeking compensation for work-related injuries can state a retaliatory discharge claim only if that claim is pursuant to the workers' compensation statute.

Even further, Monroe cannot state a retaliatory discharge claim under Illinois law in any event because he has not invoked a "public policy." Illinois law does not permit a retaliatory discharge cause of action where the dismissed employee filed a

lawsuit or otherwise pursued a legal claim against his employer (other than a worker's compensation claim), because the employee has not invoked a "public policy." *Buechele v. St. Mary's Hospital Decatur*, 509 N.E.2d 744 (Ill. App. 1987) (Court dismissed retaliatory discharge claim where the employee was discharged for filing a libel and slander suit against her employer); *Abrams v. Echlin Corp.*, 528 N.E.2d 429 (Ill. App. 1988) (Court dismissed retaliatory discharge claim where the employee was fired for threatening to take "necessary legal action to secure payment" of compensation); *Price*, 485 N.E.2d 359 (No retaliatory discharge claim where employee was fired after filing a claim under an employer-provided health insurance plan).

Illinois law also does not recognize the claim averred in Count II because Monroe has not invoked a "collective" or public right. A plaintiff cannot claim retaliatory discharge where the underlying claim was "one of private and individual grievance rather than one affecting our society." *Price*, 485 N.E.2d at 361; *see also Mitchell*, 609 N.E.2d at 380; *Abrams*, 528 N.E.2d at 435; *Buechele*, 509 N.E.2d at 747 ("The right to file a lawsuit claiming individual injury is purely a personal right and does not involve any clearly mandated public policy.") Because Monroe's claim is purely personal in nature and does not affect Illinois citizens collectively, he cannot state a retaliatory discharge claim.

Illinois courts have consistently refused to expand the scope of the retaliatory discharge claim beyond the two narrow circumstances recognized, even where employees have filed legal claims for work-related injuries (other than workers' compensation claims) against the employer. When facing an unresolved question of state law that could reasonably restrict or significantly enlarge liability, federal courts should choose the narrower path, at least until the state appellate courts hold differently. *Todd v. Societe BIC*, 21 F.3d 1402, 1412 (7th Cir. 1994).

Thus, this Court should not grant certiorari where a lower federal court would need to expand state common law to enable Monroe to state a right "independent" of the CBA and to state an actionable claim for relief.

3. Judicial Estoppel

Union Pacific and the lower courts are not the only ones to have labeled Monroe's termination claim a minor dispute which must be remedied under the RLA. In Monroe's grievance submission to the Public Law Board, the arbitral body authorized by the RLA, ardently argued that his retaliatory discharge must be assessed under the CBA and the RLA. App., A-10. Monroe asserted that:

> a claim against an employer for unmeritorious discipline whose purpose is to defeat or diminish rights under the FELA must be assessed under the collective bargaining agreement and the Railway Labor Act, rather than in a separate lawsuit under the FELA *Bielicke v. Terminal Railroad Association*, 30 F.3rd [sic] (7th Cir. 1994). Thus, this Board must determine this issue.

App., A-10 (emphasis added). Monroe asserts the converse position here, arguing that RLA preemption cannot apply. The same counsel represented Monroe in this action and before the Public Law Board. App., A-9. Because the lower courts found RLA preemption, they did not decide whether Monroe should be judicially estopped from pursuing this action.

Judicial estoppel is a flexible doctrine intended to "prevent the perversion of the judicial process." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990). The doctrine should be applied where "self-contradiction is being used as a means of obtaining an unfair advantage" and to prevent litigants "from playing fast and loose with the courts." *Id., quoting Scarano v. Central Ry. Co.*,

203 F.2d 510, 513 (3d Cir. 1953). Thus, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he cannot later assume a contrary position to suit his needs. *Cassidy*, 892 F.2d at 641, *citing Davis v. Wakelee*, 156 U.S. 680, 689 (1895). The judicial estoppel doctrine applies to positions taken on legal issues, such as subject matter jurisdiction. *Cassidy*, 892 F.2d at 641-42. The doctrine also applies where a contrary position has been taken in earlier administrative proceedings. *Czajkowski v. City of Chicago*, 810 F.Supp. 1428, 1447 (N.D. Ill. 1992).

Throughout the RLA grievance and arbitration proceedings, Monroe specifically argued that his claim against Union Pacific for retaliatory discipline was a minor dispute which must be decided pursuant to the RLA. Indeed, before the Public Law Board, Monroe relied upon the *Bielicke* decision (30 F.3d 877) to argue that his claim was a minor dispute; before the lower courts, he argued that *Bielicke* was "bad law" which must be overruled.

Monroe prevailed on his grievance claim, securing reinstatement with all seniority rights unimpaired and $177,154.70 in backpay, which equals his wages from the date of his termination until his reinstatement (even though he earned wages in other non-railroad capacities during that time). Notably, Monroe filed this suit after the Public Law Board ordered him reinstated to work. Thus, Monroe argues that the same case law compels opposite conclusions, and he waited until after he procured relief from the Public Law Board to file this suit. This case demands the application of judicial estoppel, and the lower courts may well dismiss his claims on this ground if given the opportunity. Accordingly, this Court should deny Monroe's petition for certiorari.

D. The Issues Presented Are Not Important to the Public or the Parties

This Court "does not sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74. Because of the scarcity of resources and the immense number of petitions submitted, this Court properly limits its review to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Id.* at 79. The narrow issue of RLA preemption presented by Monroe's petition is not a question of importance to the public. Monroe argues that this case presents important issues because it necessarily eliminates retaliatory discharge lawsuits for railroad employees. Not only is this argument unsound, but the class of persons who could even potentially "encounter the argument" (Monroe's Brief, at 9) that the Seventh Circuit's decision requires preemption of their claims is small. The language of the challenged decision and contemporary subsequent decisions from the Seventh Circuit and other circuits clearly demonstrate that the courts of appeals are properly applying federal labor law preemption standards, and that the public has no interest in review of the issue.

Finally, not only is the narrow RLA preemption issue unimportant to the public, it is unimportant to the parties herein. Through the RLA grievance and appeal process, Monroe recovered $177,154.70, which represents all of his lost wages for the period when he was terminated. He has been reinstated to work, with his seniority rights unimpaired. Monroe has settled his claim against Union Pacific for personal injuries arising out of the July 20, 1992 incident. He is still prosecuting his suit in the Illinois state courts which alleges fraud and civil conspiracy against Union Pacific and the persons and entities who conducted surveillance. This petition for certiorari should be regarded as simply an attempt to expand this area of law in favor

of plaintiffs, or as simply another step in Monroe's repetitive and expensive campaign of litigation against Union Pacific.

CONCLUSION

For all of the reasons stated above, this Court should deny Monroe's petition for certiorari.

Respectfully submitted,

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October 9, 1997

APPENDIX

APPENDIX A

NO. 96-2862
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-351-PER
CLAY MONROE,
Plaintiff-Appellant,

v.

MISSOURI PACIFIC RAILROAD
COMPANY and UNION PACIFIC
RAILROAD COMPANY,
Defendants-Appellees

Appeal From The United States District Court, Southern
District Of Illinois, East St. Louis Division

The Honorable Paul E. Riley,
Presiding

Missouri Pacific Railroad Company And Union Pacific
Railroad Company's Motion To Supplement The Record

COME NOW Defendants-Appellees Missouri Pacific Railroad Company and Union Pacific Railroad Company, by and through their attorneys, and respectfully move this Court pursuant to Federal Rule of Appellate Procedure 10(e), for an order allowing Defendants-Appellees to supplement the record on appeal. In support of this Motion, Defendants-Appellees state as follows:

1. One of the arguments presented in Defendants-Appellees' Brief to this Court is that the district court's judgment may be affirmed because Plaintiff-Appellant Monroe should be judi-

cially estopped from pursuing this action by his argument before the Public Law Board that his claims of retaliatory discharge and a violation of § 55 of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, present a "minor dispute" under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. *See* Brief, at 17-21. The substance of this argument is that Plaintiff-Appellant should be judicially estopped from pursuing the retaliatory discharge and § 55 claims at issue in this lawsuit because he, with the assistance of his attorney in this action, adopted positions before the Public Law Board which are completely contradictory to several positions taken in this lawsuit, particularly as to the jurisdiction (or lack thereof) of courts to decide his claims. Brief, at 17-21.

2. The district court's July 9, 1996 order dismissing this lawsuit did not address the judicial estoppel argument because the lawsuit was dismissed in its entirety on other grounds. However, even though the district court did not address this argument, judicial estoppel alone could support affirmance of the judgment. *See* Matter of Cassidy, 892 F.2d 637 (7th Cir. 1990)

3. Plaintiff's Complaint and Defendants-Appellees' Brief each note that Monroe had achieved partial success before the Public Law Board in his grievance. Brief, at 20; Complaint, Counts I and II, ¶ 12 and Exhibit B thereto. At the time the Complaint and Brief were filed, Monroe had been ordered to return to work via an interim order by Public Law Board No. 5314, but his grievance claims for backpay and restoration of seniority rights were still pending. Brief, at 20.

4. By written order dated November 22, 1996, the arbitration panel in Public Law Board No. 5314 issued its final decision in the grievance filed by Plaintiff-Appellant Monroe. The November 22 order concluded that the disciplinary investigation against Monroe was not fair and impartial, and as a result, Monroe must

be "reinstated to service with all rights unimpaired and with backpay." Public Law Board No. 5314 order, at 1. This brief order requires that Defendants-Appellees pay Monroe backpay from the date of his discharge until the day he was ordered reinstated to work, and to restore all of Monroe's seniority rights as if he had never been disciplined. The total of the backpay award amounted to $177,153.40.

5. Thus, Monroe, through his counsel in this action, has successfully prosecuted a grievance which resulted in a complete backpay award and restoration of all rights. This award was secured through positions contradictory to those asserted in this lawsuit, which underscores that Monroe has attempted to pursue a suit and grievance, take contrasting positions as to the jurisdiction and power of each tribunal, and then pick the preferable result. Therefore, the order issued by Public Law Board No. 5314 and the facts that Monroe has received $177,153.40 in backpay and has had all previous rights restored is relevant to Defendants-Appellees' judicial estoppel argument.

6. Defendants-Appellees propose to add to the record before this Court a copy of the order from Public Law Board No. 5314 and a copy of the two separate checks[1] for Monroe's backpay. The proposed additions to the record are attached to this Motion.

7. Defendants-Appellees have timely presented the proposed additions to the record. Undersigned counsel first learned of the decision in Public Law Board No. 5314 via letter dated December 11, 1996.

WHEREFORE, Defendants-Appellees Missouri Pacific Railroad Company and Union Pacific Railroad Company respect-

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[1] Two separate checks were issued to Monroe due to limitations on the capabilities of Union Pacific's payroll department. The sum of the two checks is less than the total amount of the award because appropriate taxes were withheld.

fully request this Court to enter an order allowing Defendants-Appellees to supplement the record before this Court with the attached documents, and for such other relief as is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, first class mail postage prepaid, this _____ day of December, 1996 to Mr. Jerome J. Schlichter, Schlichter, Bogard & Denton, 100 South 4th, Suite 900, St. Louis, MO 63102.

VERIFICATION

I, David Dick, hereby state under oath that the attached photocopies of the decision by Public Law Board No. 5314 and the two photocopies of the checks payable to Mr. Monroe are true and correct copies of the same.

_____

David Dick

APPENDIX B
PUBLIC LAW BOARD NO. 5314

AWARD NO.3
CASE NO.3

PARTIES TO DISPUTE:

United Transportation Union
- and -
Union Pacific Railroad Company

STATEMENT OF CLAIM:

Claim of Trainman C. E. Monroe for reinstatement to service with seniority rights and benefits unimpaired. Claim includes pay for time lost commencing with December 17, 1992, and thereafter until restored to full service.

FINDINGS:

This Public Law Board No. 5314 finds that the parties herein are Carrier and Employee, within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

The hearing officer's questions and false answers by the investigators employed by the Carrier were designed to make it appear that the surveillance was conducted in accordance with high professional standards and concern for the privacy of all parties, and that the investigation itself was therefore a fair and impartial one. The investigation was neither fair nor impartial. Accordingly this Board cannot consider the merits of this case in any respect. The Carrier did not conduct a fair and impartial investigation on December 8, 1992. Therefore the dismissal of the Claimant by letter dated December 17, 1992, which dismissal was based on the defective investigation held on December 8, 1992 must be set aside, and the Claimant must be reinstated to service with all rights unimpaired and with backpay. The

Carrier shall look to the Claimant's test period earnings for the twelve month period during which he last performed service immediately preceding the matter in question, and adjust this figure for any subsequent wage increases. Based on the record before us, we shall deem the Claimant able to return to work as of December 15, 1992. Also based on the record before this bound, the Claimant's Engine Service seniority shall place him at the 59th position on the C&EI seniority roster.

AWARD

Claim sustained

ORDER: The Carrier is required to comply with this award within thirty days. The Carrier has completed the interim award dated February 29, 1996.

_____

D. P. Twomey
Chairman and Neutral Member

_____ _____

Organization Member Carrier Member

DATED:_____

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

Case No. 96-CV-351-PER

CLAY E. MONROE,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
UNION PACIFIC RAILROAD COMPANY,
Defendants.

AFFIDAVIT

COMES NOW Catherine J. Andrews, and first being duly sworn and upon her oath, states:

1. I am at least 21 years of age and competent to make this Affidavit.

2. I am the Assistant Director of Labor Relations for the Union Pacific Railroad Company responsible for the appeal and arbitration of grievances concerning discipline imposed pursuant to the applicable collective bargaining agreement ("CBA"). As such, I am responsible for the appeal and arbitration of the grievance filed by the United Transportation Union ("UTU") on behalf of Clay E. Monroe. The procedures governing Monroe's grievance and appeal of the denial of that grievance are set forth in the CBA and the Railway Labor Act, 45 U.S.C. § 151 et seq.

3. Monroe is a member of the UTU, and is bound by the CBA between the UTU and the Railroads, relevant portions on discipline attached as Exhibit B.

4. Monroe's attorney in this civil action, Mr. Jerry Schlichter, appeared for the January 18, 1996 oral argument of Monroe's grievance before the Public Law Board. Mr. Schlichter also filed the "Organization Supplemental Submission To The National Railroad Adjustment Board" (attached as Exhibit D) in the pursuit of Monroe's grievance.

5. Mr. Monroe's grievance seeks recovery of backpay for time lost since December 17, 1992, reinstatement to service, restoration of any benefits and seniority rights, and removal of the discipline from his record.

_____

Catherine J. Andrews

On this ____ day of _____ 1996, personally appeared before me, to me known to be person described in and who executed the forgoing instrument, and acknowledged that she executed the same as her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

_____

Notary Public

My commission expires:

APPENDIX D

ORGANIZATION SUPPLEMENTAL SUBMISSION
TO THE
NATIONAL RAILROAD ADJUSTMENT BOARD

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
v.
UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM

Claim of Trainman C. E. Monroe for reinstatement to service with seniority rights and benefits unimpaired. Claim includes pay for the time lost commencing with December 17, 1992, and thereafter until restored to full service.

EMPLOYEE STATEMENT OF FACTS

Claimant, C. E. Monroe, was hired by the former Chicago & Eastern Illinois Railroad in train service on July 9, 1979. With the acquisition of that railroad by the Union Pacific, Claimant became an employee of the Union Pacific.

This dispute arises as a direct result of an injury sustained by Claimant on July 20, 1992. On that date Claimant was working as a Brakeman on Train NLCH. This train went on duty at Poplar Bluff, Missouri (M.P. 165.7), at 12:15 p.m. and was scheduled to operate to Salem, Illinois. The crew was stopped at Dexter (M.P. 189.9) to allow southbound CHDAZ to pass. At this point, the southbound train derailed and Claimant's train was thereby blocked and unable to proceed northbound.

(Pages 2-21 omitted; below are pages 22-23)

III. The Purpose and Effect of Carrier's Action Was to Circumvent Claimant's FELA Action and to Use the Limited Hearing to Eliminate His Claim for Wage Loss in the FELA Action

It has been held that a claim against an employer for unmeritorious discipline whose purpose is to defeat or diminish rights under the FELA must be assessed under the collective bargaining agreement and the Railway Labor Act, rather than in a separate lawsuit under the FELA. *Bielicke v. Terminal Railroad Association*, 30 F.3rd 877 (7th Cir. 1994). Thus, this Board must determine this issue.

It is readily apparent that the purpose of the Carrier's action as well as its effect was to obtain a great advantage in Claimant's Federal Employee Liability Act (FELA) claim by eliminating the wage loss element of his damages, thereby depriving him of the full remedy available. Chapter 45 U.S.C. § 55 provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

This prevents a railroad from escaping full liability for its employees' personal injuries, or usurping through any means the employee's right to sue for full damages under the FELA. *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1979).

Here, Carrier was able to get Claimant fired in a controlled forum, thereby eliminating any claim for wage loss in this FELA action, in violation of the letter and spirit of 45 U.S.C. § 55. Further, rather than litigating the medical capability of Claimant in that action with the right of subpoena, discovery, and an independent fact finder, the Carrier improperly used the disciplinary process to eliminate the medical issue of Claimant's

ability to work from the FELA case where it rightfully belongs, again in violation of the above section. This is not the first time this Carrier has done this. It is known to the Organization that this technique has started to be used as a litigation strategy by this Carrier. To tolerate it will be to allow a complete subversion of the purpose of the grievance process and a virtual elimination of the remedy of claimant's claim for damages under the FELA. If allowed to stand, it will also open a floodgate of abuses as Carrier see that they can eliminate claims of wage loss and medical damage in FELA actions without ever subjecting their actions to the rigor of due process or an independent determination by an impartial fact finder. Such a result simply cannot be tolerated, and this Board must clearly so rule.